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No.

IN THE

Supreme Court of the United States

BRANDIE MCLEAN, PETITIONER

v.

MISSOURI DEPARTMENT OF SOCIAL SERVICES, CHILDREN'S DIVISION, JOHN MCGINNIS AND MICKEY MORGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a federal court should apply qualified immunity with respect to Petitioner's substantive due process claim when there is a deprivation of a constitutional right that was clearly established at the time of the deprivation and genuine issues of material fact existed regarding whether the acts or omissions of social workers rose to the level of "shocking the conscience"?

II. Whether the federal court should apply the doctrine of official immunity to shield officials from liability under Missouri's Wrongful Death statute when genuine issues of material fact exist regarding whether the death of a child in the protective custody of the state arose out of discretionary acts or ministerial acts of the officials?

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The opinion of the Court of Appeals for the Eighth Circuit is reported at 548 F.3d 613 and is reprinted in the appendix hereto at p. 1a-9a, infra.

The memorandum decision of the United States District Court for the Western District of Missouri, Western Division (Fenner, D.J.) has not been reported. It is reprinted in the appendix hereto at p. 15a-22a, infra.

JURISDICTION

The Court of Appeals entered its opinion and order on December 1, 2008. A petition for re-hearing was sought and denied on January 7, 2009. It is reprinted in the appendix hereto at p. 23a, infra.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

This action is one in which the U.S. District Courts had original jurisdiction under 28 U.S.C. Section 1331, in that it arises under the constitution laws, treaties of the United States. The U.S. District Court had supplemental jurisdiction under 28 U.S.C. Section 1367 of the Missouri Wrongful Death claim in that it so related to claims in the action to which the District Court had original jurisdiction in that it formed part of the same case or controversy.

RELEVANT PROVISIONS INVOLVED (see appendix)

STATEMENT

On August 26, 2005, McLean filed a Petition in the Circuit Court of Jasper County, Missouri, Case No. 05AO-CC00535. On September 30, 2005, Defendants filed a Notice of Removal in the U. S. District Court, Western District of Missouri. On October 19, 2005, an Answer to the Complaint was filed on behalf of McGinnis, Morgan and DSS.

On April 17, 2006, McLean filed her First Amended Complaint in the U. S. District Court for the Western District of Missouri, Case No.: 3:05-CV-04308-GAF. McLean asserted claims against Defendant McGinnis, Morgan and DSS pursuant to 42 U.S.C. Section 1983 and Missouri Revised Statute Section 537.080 et. seq., and sought monetary relief. Specifically, McLean sought damages resulting from the death of her son BDW, who was killed on June 2, 2005 by EG, the biological son of Mark and Treva Gordon, who were BDW's foster parents at the time of his death. McLean's First Amended Complaint alleged that McGinnis, Morgan and DSS acted recklessly and with gross negligence in failing to monitor and adequately supervise the Gordons and the decedent, BDW, in the provision of supervision and case worker services to the Gordons and to BDW while BDW was residing in the Gordon's foster home.

McLean alleged that Respondents failed to follow internal DSS policies and practices as well as statutory requirements and regulations designed to protect BDW. Further, McLean alleged deprivation by Respondents McGinnis, Morgan and DSS under color of state law of rights, privileges and immunities secured by the statutes

and the constitution of the United States of America.

McGinnis, Morgan and DSS filed their answer to McLean's Amended Complaint on May 5, 2006, denying McLean's allegations.

On January 16, 2007, McGinnis, Morgan and DSS filed their Motion for Summary Judgment with Suggestions in Support. McLean filed her Reply to Defendants' Motion for Summary Judgment and Suggestions in Opposition to the Motion for Summary Judgment on April 26, 2007.

On May 4, 2007, the District Court entered an Order denying, in part, Morgan, McGinnis and DSS's Motion for Summary Judgment. (App. 15a-22a) Specifically, the District Court held that McGinnis and Morgan were not entitled to qualified immunity with respect to McLean's Section 1983 claim because issues of fact existed as to whether their actions reached the level of "shocking the conscience". The District Court further held that DSS was not entitled to 11th Amendment immunity with respect to the Section 1983 claim which is not disputed on this appeal. The District Court also held that McGinnis and Morgan were not entitled to official immunity based upon the court's conclusion that their actions or inactions could not, as a matter of law, be held to be related only to discretionary functions. (App. 15a-22a)

On May 11, 2007, the District Court stayed all proceeds pending resolution of this Appeal. Appellants' filed their Notice of Appeal on May 17, 2007.

The Eighth Circuit Court of Appeals entered its judgment and opinion on December 1, 2008, determining first that the District Court erred in denying the protections of qualified immunity to Morgan and McGinnis and the Section 1983 claim, relying on *James ex rel. James v. Friend*, 458 F.3d 726, 728-30 (C.A.8 (Mo.) 2006) to find that the actions of Morgan and McGinnis in repeatedly failing to the check the Gordon's home for unsecured firearms was not conscience shocking. (App. 1a-9a and 11a-12a)

The Eighth Circuit also opined that the District Court erred in denying Morgan and McGinnis' Motion for Summary Judgment on the official immunity basis finding that the actions of Morgan and McGinnis' responsibilities to insure that the Gordon's home was safe were discretionary as a matter of law and therefore, finding official immunity protects Morgan and McGinnis for liability under Missouri's wrongful death statute. (App. 1a-9a)

Further, the Eighth Circuit Court of Appeals found that the District Court erred in failing to grant summary judgment for DSS, an agency "arm of the state" on the Section 1983 claim brought by the claim. This ruling is not presented to this court. (App. 1a-9a)

Thereafter, McLean filed a Petition for Panel Rehearing which was denied by Order Denying Rehearing dated January 7, 2009. (App. 23a)

Mandate was issued herein on January 15, 2009, (App. 10a) which was so ordered by the United States District Court for the Western District of Missouri,

Southwestern Division on January 21, 2009. (App. 13a-14a)

REASONS FOR GRANTING THE PETITION

I. Qualified Immunity. The United States Court of Appeals Eighth Circuit has decided a important question of qualified immunity in a way that conflicts with relevant decisions of this court.

The decision of the Eighth Circuit in this case squarely and irreconcilably conflicts with the principals set forth by this court in *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189 (1989); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

The Due Process Clause of the 14th Amendment of the Constitution imposes a duty to protect the safety and general well being of those taken into a state's custody.

> "The rational for this principle is simple enough: when the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care and reasonable safety, it transgresses the substantive limits on state action set by the due process clause."

DeShaney v. Winnebago County Dept. of Soc. Services, 489 U.S. at 189, 200 (1989). The affirmative duty to

protect arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations which are imposed on his freedom to act on his own behalf. *Id.* at 200.

Respondents McGinnis and Morgan are not entitled to qualified immunity with respect to McLean's substantive due process claim because:

A. *Defendants Had a Duty to Protect BDW*

Foster care is designed to provide basic human needs of "food, clothing, shelter, medical care and reasonable safety" to minor children. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989). The specific source of an affirmative duty to protect is the custodial nature of a "special relationship" between the individual and the State. *Id.* The key is whether the State has assumed a custodial role in an individual's life and whether as a result of that role, the State has actively participated in creating the dangerous environment. *Burton v. Richmond*, 276 F.3d 973 (C.A.8 (Mo.) 2002).

Defendants Morgan and McGinnis had a duty to protect BDW, because unlike the plaintiffs in *Burton v. Richmond*, 370 F.3d 723 (CA. 8 (Mo.) 2004) relied on by the Eighth Circuit, BDW was in the legal custody of DFS at the time of his death. *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289 (C.A. 8 (Ark.) 1993). "Since 1993, we have recognized that children taken into state custody maintain a clearly established right to be kept in reasonable safety while in foster care." *James ex rel James v. Friend*, 458 F.3d 726, 732 (C.A. 8 (Mo.) 2006).

B. *Defendants Violated Clearly Established Law*

Government officials are not entitled to qualified immunity under Section 1983, even if performing discretionary functions, when they violate clearly established law. *Burton v. Richmond*, 370 F. 3d 723 (C.A. 8 (Mo.) 2004).

At the time of BDW's death, the law was clearly established that defendants had a duty to protect a child in DSS custody. *James ex rel James v. Friend*, 458 F. 3d 726, 728-30 (C.A. 8 (Mo.) 2006).

The laws and regulation of Missouri, particularly 13 CSR 40-60.040(1)(D), (see App. 28a) mandated that all weapons **shall** be made inaccessible to children. As stated by this court in *Porter*, "shall" indicated acts required without regard to the social worker's own judgment or opinion. *Porter v. Williams*, 436 F 3d 917 (C.A. 8 (Mo.) 2006). Such acts are ministerial, not discretionary. *Porter v. Williams*, 436 F. 3d at 922.

The Defendants did not make a discretionary decision to believe the foster parents as in *James ex rel. James v. Friend*, 458 F.3d 726 (C.A. 8 (Mo.) 2006). They failed to even investigate as mandated by law, even though there was documentation of an arsenal of weapons in the DSS files and the Respondents were aware of a substantial change of circumstances including a new residence for the foster family.

This case should be distinguished from *Burton v. Richmond*, 370 F.3d 723 (C.A. 8 (Mo.) 2004). The child in

this case, BDW, was in DSS custody, contrary to Burton where the alleged misconduct occurred prior to being placed in DSS custody. The Defendants took custody of BDW, placed him in a home with foster parents known by DSS to possess assault rifles and other firearms, and then did nothing to ensure that those weapons were inaccessible to children as mandated by state regulation. It was not that the Respondents merely made a mistake about how to make the weapons inaccessible to children, even though their manuals specifically delineated the manner in which any weapons were to be stored. The facts are that the Respondents, in violation of the law, never asked the required questions and they never made the required inspection of the foster family residence. This **is** unconscionable conduct that shocks the contemporary conscience.

C. *Respondents Actions Were Conscience – Shocking*

If Plaintiff's allegations are true, this demonstrates not only the custodial role of the Respondents required by *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989) and other decisions by this court, but a deliberate indifference to BDW's welfare. It is clear that the district court found that the actions of the Respondents as alleged by the Plaintiff shocked the conscience.

The following facts concerning the actions of Respondents McGinnis and Morgan were considered by the district court but overlooked by the Eighth Circuit Court of Appeals:

i. There was a record of not one, but an arsenal of weapons, including three (3) SKS assault rifles, a .38 revolver, a semi-automatic .9 mm Ruger pistol, a .22 pistol, a shotgun and a rifle in the DSS files;

ii. McGinnis and Morgan were aware of the change of residence of the foster family, including BDW and other foster children.

iii. Respondent Morgan admits in her deposition (p. 23, lines 5-10) that a new safety checklist (Missouri Form CS-45) (App. 36a-40a) was to be performed at each home of the foster parent, however, neither defendant performed the safety check or delegated that task to another individual.

iv. Respondents McGinnis and Morgan had the responsibility to insure that the foster parents are continually evaluated and to keep others informed of significant changes, which would include a change in the physical structure that required Defendants to comply with the provisions of 13 C.S.R. 40-60.040. (App. 28a-31a)

The Respondents cannot ignore the responsibility to ensure the safety and welfare of a child in their custody and then hide behind their alleged ignorance of the

dangerous situation to deny responsibility for the tragic outcome. This is clearly not the intent of the 14th Amendment of the Constitution or the protections afforded under 42 U.S.C. Section 1983.

D. *Genuine Issues of Material Fact Precludes Summary Judgment*

Pursuant to Federal Rule of Civil Procedure 56(c), a court may grant a motion for summary judgment only if all of the information before the court shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fed.R.Civ.P. 56(c) (App. 32a-34a) *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court may not "weigh the evidence in the summary judgment record, decide credibility questions, or determine the truth of any factual issue". *Coleman v. City of Pagedale*, 2008 WL 161897 (E.D.Mo.) citing *Kampouris v. St. Louis Symphony Soc.*, 210 F.3d 845, 847 (C.A. 8 (Mo.) 2000). The court instead "perform[s] only a gatekeeper function of determining whether there is evidence in the summary judgment record generating a genuine issue of material fact for trial on each essential element of a claim." *Id.* The trial court should not act other than with caution in granting summary judgment and may deny summary judgment where there is reason to believe that the better course would be to proceed to a full trial. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

In this case, as a matter of law, the District Court correctly found that genuine issues of material fact existed, however this decision was overruled by the Eighth Circuit Court of Appeals. A "genuine issue" that

will prevent summary judgment exists where the record shows two plausible but contradictory, accounts of the essential facts and the "genuine issue" is real, not merely argumentative, imaginary or frivolous. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. Banc. 1993). Here, the Plaintiffs allege that neither Morgan nor McGinnis ever inquired about whether the foster family's numerous guns were made inaccessible to children, despite the fact that the existence of those guns was documented in DSS files and the legal mandate of 13 CSR 40-60.040 (1)(D) (App. 28a) required that all weapons **shall** be inaccessible to children. However, Respondents Morgan and McGinnis claim to have no reason to know about the guns and no reason to ask the foster parents about the guns and no reason to suspect that the Gordons had unsecured guns in their home. The district court properly found that the conflicting versions of these facts, among others, created genuine factual disputes that prevented summary judgment in favor of the Respondents, and the Eighth Circuit's decision to the contrary should be overruled.

II. Official Immunity. The United States Court of Appeals Eighth Circuit has decided an important question regarding the official immunity doctrine in a way that conflicts with decision of the Missouri Supreme Court and has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power.

According to the official immunity doctrine, public officials acting within the scope of their authority are

liable for injuries arising from torts committed when acting in a ministerial capacity but may be protected from liabilities for injuries arising from their discretionary acts. *Porter v. Williams*, 436 F.3d 917 (C.A. 8 (Mo.) 2006). The Missouri Supreme Court has defined discretionary acts as acts which require the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or course pursued. *Jungerman v. City of Raytown*, 925 S.W.2d 202 (Mo. Banc. 1996) citing *Kanagawa v. State by and through Freeman*, 865 S.W.2d 831, 836 (Mo. Banc. 1985). In contrast, the Missouri Supreme Court has defined ministerial acts as acts that require certain duties to be performed upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to an employee's own judgment or opinion concerning the propriety of the act to be performed. *Jungerman v. City of Raytown*, 925 S.W.2d at 205. The Missouri Supreme Court makes it clear that "the fact that written procedures cannot anticipate every circumstance does not transform a ministerial activity into a discretionary function". *Id.* at 206.

The Eighth Circuit erroneously found that that Morgan and McGinnis's responsibilities to insure that the Gordons' home was safe was discretionary as a matter of law. McGinnis and Morgan are not entitled to Summary Judgment on the issue of official immunity under McLean's claim of wrongful death pursuant to Missouri's wrongful death statute Section 537.080 RSMo. as set forth below.

The official immunity doctrine generally does not apply to public officials responding to non-emergencies

for ministerial, nondiscretionary duties. *Brown v. Tate*, 888 S.W. 2d 413 (Mo. Ct. App. W.D. 1994). According to the official immunity doctrine, public officials acting within the scope of their authority are not liable for injuries arising from their discretionary acts, or omissions, but they may be held liable for torts committed when acting in a ministerial capacity. *Porter v. Williams*, 436 F.3d 917 (C.A. 8 (Mo.) 2006). *Porter* involved an action against the social worker and others after a child died from abuse after being placed in a foster home, where the court determined that genuine issues of material fact existed which precluded summary judgment on official immunity grounds.

The Eighth Circuit overlooked or disregarded material facts, to wit:

a. Missouri State Regulation 13 C.S.R. 40-60.040, requires certain conditions to be placed upon the home in which foster children will be living. Pursuant to subsection (1)(D) of the regulation, "All flammable liquids, matches, cleaning supplies, poisonous materials, medicines, weapons or other hazardous items **shall** be stored so as to be inaccessible to the children." (emphasis added) (App. 28a). The regulation makes it mandatory that all weapons shall be made inaccessible. This is **not** a discretionary rule. As stated in *Porter*, the word "shall" indicated acts that were required without regard to the social worker's own judgment or opinion. Those acts were ministerial, not discretionary.

Porter v. Williams, 436 F.3d 917, (C.A. 8 (Mo.) 2006).

b. When the foster parents lived at a prior residence, a home inspection was performed by an agent of the Jasper County Children's Division for that residence at 304 E. Fox Street, Alba, Missouri. That inspection revealed numerous weapons possessed by the foster parents at that address including three (3) SKS assault rifles, a .38 revolver, a semi-automatic .9 mm Ruger pistol, a .22 pistol, a shotgun and a rifle; and this report was placed in the DSS file.

c. Morgan admits in her deposition that the primary purpose for visiting the foster home was to insure a safe environment (depo. p. 32, lines 16-20); that it was the policy of the state to insure that a new safety checklist is done on each home of a foster parent (depo. p. 23, lines 5-10); and further that in the past she had completed new safety checklists called form CS-45, for foster parents who moved into a new home (depo. p. 21, lines 8-25).

d. The form CS45 referred to by Morgan in her deposition is a "Kinship Home and Safety Checklist" (App.36a-40a). The form is to be used by the social service worker and social service supervisor as noted on the last page of the form where there is a

place for the social service worker and supervisor to sign after the words "I have toured this home and reviewed this form with the potential placement parent(s) and am of the opinion that the above information is accurate and that the home and potential kinship parents appear acceptable for the kinship with the possible concerns and limitations as noted." (App. 40a).

e. Morgan knew the parties had moved into a second residence and had visited the foster children, including BDW, at the second residence. However, she did not complete the required safety checklist (Missouri Form CS45) (App. 36a-40a) nor did she require someone else to complete the safety checklist.

f. Morgan admits in sworn deposition testimony that she knew that weapons pose a serious risk of harm to foster children (depo. p. 38, lines 1-12) and it was part of Morgan's duty as a Social Worker to insure the safety of the foster home and to carry out a case plan that leads to an adequate level of care for the child.

g. Morgan admits in her deposition that it was the policy that ". . .if there is any guns they have to have a trigger lock on the triggers

and they need to not be accessible to the children." (depo. p. 19, lines 10-14).

h. DSS Manuals provided specific methods by which weapons were to be made inaccessible to children, thereby removing any discretion on the part the caseworker, i.e.:

i. Guns and weapons were to be stored unloaded (App.35a)

ii. Guns and weapons were to be stored in an uncocked position (App. 35a)

iii. Guns and weapons were to be stored in a securely locked case out of children's reach (App. 35a);

iv. Ammunition was to be stored separately in a securely locked container out of the reach of children (App. 35a); and

v. Trigger locks or other child proof devices were always to be used (App.35a)

The Missouri regulation 13 CSR 40-60.040(1)(D) (App. 28a) makes it mandatory, not discretionary, that all weapons **shall** be stored so as to be inaccessible to the children. The DSS form CS45, (App. 36a-40a) mirrored the language of the regulation and provided a checklist for use in assessing the physical and safety requirements

of the placement home, to be signed by both the social service worker and the social service supervisor to ensure that the required physical inspection of the foster home was performed and appeared to meet the safety requirements for the safety of the foster child. This was never done on the foster family residence at 104 South Smith Street.

The Eighth Circuit relies on the premise that the Code of State Regulations did not prescribe how to make the foster home free from weapons that are accessible to children and declared that to mean it was discretionary in nature. However, as stated above, 13 C.S.R. 40-60.040(1)(D) mandated that weapons **shall** be made inaccessible, therefore although the Respondents may have had some discretion in determining whether the weapons were inaccessible, Respondents were allowed NO discretion about whether to make the assessment. The purpose of 13 CSR 40-60.040 (1)(D) (App. 28a) and form CS-45, (App.36a-40a) was to insure that the proper inquiry was made. As stated by the Missouri Supreme Court, "the fact that written procedures cannot anticipate every circumstance does not transform a ministerial activity into a discretionary function". *Jungerman v. City of Raytown*, 925 S.W.2d 202 (Mo. Banc. 1996).

The Eighth Circuit incorrectly found that there was no policy imposing a duty on Morgan or McGinnis to complete the CS-45 form (App. 36a-40a) at any time after the Gordons were initially approved to serve as foster parents. However, this finding directly conflicts with Respondent Morgan's deposition testimony that it was DSS policy to complete a new CS-45 form (App. 36a-40a) on each new home when a foster parent changed

residence and that she, in the past, had completed the form in just such a circumstance.

It could be argued that determining whether the home was deemed "safe" involved some discretion on the part of the social worker or social service supervisor. However, the mandates of the Missouri Regulation 13 CSR 40-60.400(1)(D) require that weapons **shall** be made inaccessible to children. (App. 28a) It is mandatory and is **not discretionary**. Since non-discretionary functions are not protected by the doctrine of official immunity, summary judgment in favor of the Social Worker, Respondent Morgan; or the Social Service Supervisor, Respondent McGinnis, is not appropriate and the Eighth Circuit Court of Appeal's granting of summary judgment on the Missouri Wrongful Death Claim should be overturned.

III. The Questions Presented are Important

Both questions presented have a broad impact on the safety, health and welfare of children throughout this country who have been removed from their parental homes and placed in foster care under the custody of the Missouri Division of Social Services. The situation is particularly egregious given that the children in state custody are unable to speak for themselves and are at the complete mercy of the actions or omissions of the social workers hired by the state to protect them. As stated by this court in *Youngberg v. Romeo*, 457 U.S. 307 (1982), the right to personal security constitutes a historic liberty interest protected substantively by the due process clause, and that right is not extinguished by lawful confinement, even for penal purposes.

Foster care is designed to provide basic human needs of "food, clothing, shelter, medical care and reasonable safety" to minor children. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989). The specific source of an affirmative duty to protect is the custodial nature of a "special relationship" between the individual and the state. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989) this court reasoned that "the affirmative duty to protect arises not from the state's knowledge of the individuals predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act in his own behalf". *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989). In emphasizing this rule of law, this Supreme Court cited to the holdings of *Estelle v. Gamble*, 429 U.S. 97 (1976); *Youngberg v. Romeo*, 457 U.S. 307 (1982); and *Kanagawa v. State by and through Freeman*, 865 S.W.2d 831, 836 (Mo. Banc. 1985), all of which were decided well before BDW's placement with his foster family.

Based on data provided by the U. S. Department of Health and Human Services submitted as of January 16, 2008, there are more than 500,000 children in the foster care system throughout the United States. (Wikepedia.org/wiki/foster_care *citing Dorsey, et al* current status and evidence base of training for foster and treatment foster parents.)

In the United States, accidents involving firearms kill 250 children under the age of 14 every year. Missouri is not exempt from this tragedy. In 2004, 36 children were killed by a firearm. In 2005, at least 13 Missouri

children died as a result of a firearm injury. (DSS publication "Family Connections" – Summer 2005, p. 4)

This case is brought by McLean, the natural mother of BDW, as a result of the child's tragic death by a gunshot wound to the head after the child was placed in the legal custody of the Missouri Department of Social Services, Children's Division (DSS). The sad truth is that this tragic result could be repeated again and again if social workers are not required to perform even the rudimentary duties mandated by law and by their own internal policies.

As the legal custodian of BDW, it was Respondents' ultimate responsibility to insure that BDW was provided a safe and nurturing environment. It was Respondents' responsibility to ensure that the foster parents were appropriately trained and continually evaluated and it was ultimately Respondents' responsibility to ensure that any weapons were made inaccessible to children by being stored in a very specific manner.

The Respondents' own files and records reflect that the Respondents were aware that the foster parents possessed not just one weapon but a virtual arsenal of weapons including three (3) SKS assault rifles, a .38 revolver, a semi-automatic .9 mm Ruger pistol, a .22 pistol, a shotgun and a rifle. Not once when the foster parents moved to a new residence, did any of the Respondents ask any questions regarding the firearms that the foster parents had earlier admitted to having.

None of the Respondents inquired as to where the guns were stored; whether the guns were stored unloaded and in an uncocked position; whether the guns were in a securely locked case out of the children's reach; whether or not the ammunition was stored separately; whether or not the ammunition was in a securely locked container out of the reach of children; nor whether trigger locks or other child proof devices were used to secure any of the weapons, as required by law and DSS procedures. (App. 35a and 36a-40a STARS Manual)

The Respondents were mandated by law to insure that any weapons were made inaccessible to children. Respondents were provided with a checklist and were required to ask specifically whether the weapons were made inaccessible to children and the manner in which the weapons were to be made inaccessible to children was clearly laid out in their procedural manual so that no gun expertise or discretional judgments were required to determine whether or not any weapons were indeed inaccessible to the children. DSS, Morgan and McGinnis' failure to follow their own clearly established procedure resulted in the tragic death of BDW, a child that had been placed in DSS's legal custody for the purpose of insuring his safety and welfare.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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No. 07-2250

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Brandie McLean,
Plaintiff-Appellee,

Rhonda Stone, Rhonda Stone as Next Friend of Minors ZPW(I), ZPW(II), CZW and KSW, Minors; ZPW(I), by Next Friend Rhonda Stone; ZPW(II), by Next Friend Rhonda Stone; CZW, by Next Friend Rhonda Stone; KCW, by Next Friend Rhonda Stone,
Plaintiffs

v.

Mark Gordon; Treva Gordon; Ethan Gordon,
Defendants,

John McGinnis; Mickey Morgan; Missouri Department of Social Services, Children's Division,
Defendants-Appellants.

February 13, 2008, Submitted
December 1, 2008, Filed

Appeal from the United States District Court
for the Western District of Missouri.

Before MELLOY, GRUENDER, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

John McGinnis, Mickey Morgan, and the Missouri Department of Social Services (DSS) appeal the district court's denial of their motion for summary judgment. We reverse the denial and remand this matter to the district court.

I.

The facts of this case are tragic. On June 2, 2005, Braxton Wooden, Jr. died as a result of an accidental shooting. At the time of the shooting, Braxton was a foster child in the custody of DSS and placed with DSS-approved foster parents, Mark and Treva Gordon. On that June day, Treva Gordon left Braxton, then eight years old, and her biological son Ethan, then 14, alone in the home while she attended to a work-related errand. Ethan retrieved a .38 caliber handgun that his father had hidden beneath clothing on a shelf at the back of the parents' closet. While playing "cops and robbers," Ethan pulled the trigger and a .38 caliber round struck Braxton in the head. Ethan was not aware that the gun was loaded. Braxton died in route to a hospital in Kansas City.

Brandie McLean, Braxton's biological mother, brought this suit against, among others, DSS social worker Mickey Morgan, Morgan's supervisor John McGinnis, and DSS, pursuant to 42 U.S.C. § 1983 and Missouri's Wrongful Death Statute, Mo. Rev. Stat. § 537.080. According to the allegations in McLean's complaint, Morgan, McGinnis, and DSS "acted negligently, recklessly and with gross negligence" in failing to properly evaluate and supervise the Gordons, including ensuring that adequate supervision was available and that there were no weapons accessible to children in the

home. McLean also alleged that these defendants, in violation of section 1983, acted "in a gross and negligent manner, and with deliberate indifference" in failing to follow internal policies and practices designed to protect foster children.

Morgan, McGinnis, and DSS filed a motion for summary judgment. Morgan and McGinnis asserted that they were shielded from suit under the doctrines of qualified and official immunity. DSS claimed that it was protected from liability by sovereign immunity. The district court granted in part and denied in part the summary judgment motion. The district court granted summary judgment to DSS on McLean's state-law wrongful death claim. This grant of summary judgment to DSS is not before us. The district court denied qualified immunity to Morgan and McGinnis on the section 1983 claim and official immunity on the state-law wrongful death claim. The court also denied summary judgment to DSS on the section 1983 claim, holding that the state had waived Eleventh Amendment immunity when it removed the action from state to federal court. This interlocutory appeal challenging the denials followed.

II.

On appeal, the defendants argue that the district court erred in holding that (1) Morgan and McGinnis were not entitled to qualified immunity on the section 1983 claim, (2) Morgan and McGinnis were not entitled to official immunity on the wrongful death claim, and (3) DSS was not entitled to sovereign immunity under section 1983. We review the district court's denial of summary judgment de novo. *Brown v. Fortner*, 518 F.3d 552, 558

(8th Cir. 2008). We consider the evidence in the light most favorable to McLean, making all reasonable inferences in her favor. *Id.* Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A.

In considering a motion for summary judgment on qualified immunity grounds, the court makes two inquiries. First, the court asks "whether the facts alleged, taken in the light most favorable to [McLean], show that [Morgan and McGinnis's] conduct violated a constitutional right." *Flowers v. City of Minneapolis*, 478 F.3d 869, 872 (8th Cir. 2007); *see Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "If so, then [the court] determine[s] whether the constitutional right was clearly established at the time." *Flowers*, 478 F.3d at 872.

"To establish a violation of substantive due process rights by an executive official, a plaintiff must show (1) that the 'official violated one or more fundamental constitutional rights, and (2) that the conduct of the executive official was shocking to the 'contemporary conscience.'" *Id.* at 873 (*quoting County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). Conscience-shocking behavior is "egregious" or "outrageous" behavior. *Lewis*, 523 U.S. at 847 n.8. "Mere negligence is not conscience-shocking and cannot support a claim alleging a violation of a plaintiff's substantive due process rights." *Avalos v. City of Glenwood*, 382 F.3d 792, 799 (8th Cir. 2004).

The district court, in denying Morgan and McGinnis qualified immunity, held that genuine issues of fact remained regarding "whether Morgan and McGinnis committed acts or omissions that rise above mere negligence and reach the level of 'shocking the conscience.'" Specifically, the district court noted that "neither Morgan nor McGinnis ever inquired about whether the Gordons' numerous guns were unloaded and secured, despite the fact that the existence of these guns at the Gordons' home was well documented."

The actions of Morgan and McGinnis in repeatedly failing to check the Gordons' home for unsecured firearms was not conscious-shocking. Even though there was documentation that firearms were in the home, there was no evidence available to either Morgan or McGinnis prior to the incident that any firearm was unsecured or accessible to the children in the home. While failing to inquire about the location of the firearms might rise to the level of negligence, it does not approach the much higher standard of conscience-shocking conduct that is required to maintain this action. *See James ex rel. James v. Friend*, 458 F.3d 726, 728-30 (8th Cir. 2006) (holding that social workers' decision to accept foster parents' explanations for bruising and return the child to the home, where the child later was subjected to physical abuse that resulted in his death, was not conscience-shocking behavior); *Burton v. Richmond*, 370 F.3d 723, 729 (8th Cir. 2004) (determining that social workers' "failure to respond to two reports of sexual abuse and . . . failure to conduct a background check" of the children's relatives prior to placement was "not so outrageous or egregious as to shock the conscience and thus the failure to investigate did not violate [the children's] substantive

due process rights"). Thus, the district court erred in denying the protections of qualified immunity to Morgan and McGinnis on the section 1983 claim.

B.

In denying Morgan and McGinnis's claim to official immunity on the state-law wrongful death claim, the district court found "that numerous of Morgan's and McGinnis' actions did not involve any degree of discretion, but instead involved simply following DSS policy with regard to ensuring the safety of foster children" and that "numerous factual disputes regarding what DSS policy required of DSS employees with respect to the safety of foster children, and what degree of discretion DSS employees were afforded in implementing the applicable policy" remained.

"Under Missouri law, the doctrine of official immunity protects public officials from civil liability for injuries arising out of their discretionary acts or omissions performed in the exercise of their official duties. Official immunity does not, however, shield officials for liability arising from their negligent performance of ministerial acts or functions." *James ex rel. James*, 458 F.3d at 731 (citations omitted). The Missouri Supreme Court has explained "[a] ministerial function is one which a public officer is required to perform 'upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to [an employee's] own judgment or opinion concerning the propriety of the act to be performed.'" *Charron v. Thompson*, 939 S.W.2d 885, 886 (Mo. 1996) (en banc) (*quoting Rustici v. Weidemeyer*, 673 S.W.2d 762, 769 (Mo. 1984) (en banc)). Whether a state official's action

"is discretionary or ministerial is a case by case determination to be made after weighing 'such factors as the nature of the official's duties, the extent to which the acts involve policymaking or the exercise of professional expertise and judgment.'" Id. (*quoting Kanagawa v. State ex rel. Freeman*, 685 S.W.2d 831, 836 (Mo. 1985) (en banc)).

The district court did not specify what actions or inactions it believed that Morgan and McGinnis took that were ministerial and non-discretionary and subject only to the "implement[ation] [of] clearly defined DSS procedures and policies with regard to the safety of foster children." Appellee argues that the ministerial duties pertained to the completion of the CS-45 form ("Kinship Home and Safety Checklist") and to the general requirement found in the Code of State Regulations that foster homes be free from weapons that are accessible to children. *See* Mo. Code Regs. Ann. tit. 13, § 40-60.040 (rescinded January 30, 2007).

First, Appellee presents no policy imposing a duty on Morgan or McGinnish, or any state official, to complete the CS-45 form at any time after the Gordons were initially approved to serve as foster parents. Another social worker had completed the CS-45 form for the Gordons in August 2003. At that time, the Gordons reported that any weapons were stored in a manner so as to be inaccessible to children. Second, the Code of State Regulations requirement that the foster home be free from weapons that are accessible to children does not prescribe how that directive is to be met; therefore, much discretion is left to the state actors to implement it. The district court erred in denying Morgan and McGinnis's motion for summary judgment on the

official immunity basis. In response to the motion for summary judgment, McLean failed to present facts that create a genuine issue that Morgan or McGinnis negligently performed or failed to perform any ministerial duty. Further, Morgan and McGinnis's responsibilities to insure that the Gordons' home was safe were discretionary as a matter of law. Accordingly, official immunity protects Morgan and McGinnis from liability under Missouri's Wrongful Death Statute.

C.

McLean's action was originally filed in state court, and the defendants, including DSS, voluntarily removed it to federal court. The district court held that this voluntary removal resulted in DSS's waiver of Eleventh Amendment immunity. DSS maintains that even if it did waive Eleventh Amendment immunity, the district court failed to consider its claim of sovereign immunity. Alternatively, DSS argues that the State is not a person for purposes of section 1983 litigation, and therefore DSS may not be sued under section 1983.

We need not address the question of whether the State waived its Eleventh Amendment immunity by voluntarily removing this matter to federal court. Section 1983 provides for an action against a "person" for a violation, under color of law, of another's civil rights. As the Supreme Court reminded us, "a State is not a 'person' against whom a § 1983 claim for money damages might be asserted." *Lapides v. Bd. of Regents*, 535 U.S. 613, 617, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002); *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) ("We hold

that neither a State nor its officials acting in their official capacities are 'persons' under § 1983."); *see Howlett v. Rose*, 496 U.S. 356, 365, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990) ("*Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court."). Thus, the district court erred in failing to grant summary judgment for DSS, an agency or "arm[] of the State," on the section 1983 claim brought by McLean.

III.

Accordingly, we reverse the denial of summary judgment for Morgan and McGinnis on the section 1983 claim and the state wrongful death claim. We further reverse the denial of summary judgment for DSS on the section 1983 claim. We remand this matter to the district court with instructions to enter summary judgment in accordance with this opinion.

Filed 1/15/2009
No. 07-2250
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Brandie McLean,
Plaintiff-Appellee,

Rhonda Stone, Rhonda Stone as Next Friend of Minors ZPW(I), ZPW(II), CZW and KSW, Minors et al.,
Plaintiffs

v.

Mark Gordon et al.,
Defendants,

John McGinnis et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

MANDATE

In accordance with the opinion and judgment of 12/01/2008, and pursuant to the provisions of Federal Rule ofAppellate Procedure 41(a) the formal mandate is hereby issued in the above-styled matter.

Filed 12/11/2008
No. 07-2250
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Brandie McLean,
Plaintiff-Appellee,

Rhonda Stone, Rhonda Stone as Next Friend of Minors ZPW(I), ZPW(II), CZW and KSW, Minors et al.,
Plaintiffs

v.

Mark Gordon et al.,
Defendants,

John McGinnis et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parites and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

Order Entered in Accordance with Opinion:
Cierk, U.S. Court of Appeals, Eighth Circuit

/s/Michael E. Gans

Filed 1/21/2009
Case No. 05-4308-CV
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

BRANDIE MCLEAN,
Plaintiff,

vs.

MISSOURI DEPARTMENT OF SOCIAL SERVICES, CHILDREN'S DIVISION, et al.,
Defendants.

ORDER

Pending before the Court is the Mandate of the United States Court of Appeals for the Eighth Circuit regarding summary judgment for Defendants John McGinnis, Mickey Morgan, and the Missouri Department of Social Services. (Doc. #89). In accordance with the Eighth Circuit's Judgment and Opinion, (Doc. #88), with regard to the interlocutory appeal of Defendants McGinnis, Morgan, and the Missouri Department of Social Services, (Doc. #80), summary judgment is GRANTED for Defendants McGinnis and Morgan on Plaintiff Brandie McLean's ("Plaintiff') section 1983 claim on qualified immunity grounds. In addition, summary judgment is GRANTED for Defendants McGinnis and Morgan on Plaintiff's state-law wrongful death claim on official immunity grounds. Finally, summary judgment is GRANTED for Defendant Missouri Department of Social Services on

Plaintiff's section 1983 claim as "a State is not a 'person' against whom a § 1983 claim for money damages might be asserted." See Lapides v. Bd. of Regents, 535 U.S. 613, 617 (2002).

IT IS SO ORDERED.

s/ Gary A. Fenner Gary A. Fenner, Judge United States District Court

DATED: January 21, 2009

Filed 5/4/2007
Case No. 05-4308-CV
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

BRANDIE MCLEAN,
Plaintiff,

vs.

MISSOURI DEPARTMENT OF SOCIAL SERVICES, CHILDREN'S DIVISION, et al.,
Defendants.

ORDER

Pending before the Court is a Motion for Summary Judgment, filed by Defendants Missouri Department of Social Services, Children's Division ("DSS"), John McGinnis ("McGinnis"), and Mickey Morgan ("Morgan") (collectively "Defendants"). (Doc. #50). Plaintiff, Brandie McLean ("Plaintiff '), opposes Defendants' Motion. (Doc. #67). Having considered the facts and arguments presented by the parties, Defendants' Motion is GRANTED IN PART AND DENIED IN PART.

DISCUSSION

I. Legal Standard

Defendants filed this Motion for Summary Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. According to this Rule, summary judgment

is appropriate when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When considering this Motion, the Court views all facts in the light most favorable to Plaintiff and gives her the benefit of all reasonable inferences. See Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th 1997). The Court will not weigh the credibility of the evidence, but rather will focus on whether a genuine issue of material fact exists for trial. Roberts v. Browning, 610 F.2d 528, 531 (8th Cir. 1979); United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978).

II. Analysis

A. Background

This case arises from the death of 8 year-old Braxton Wooden ("BDW") while he was in the legal custody of the DSS. In June 2005, several months after BDW's placement in the home of Mark and Treva Gordon (the "Gordons"), the Gordons' biological son shot and killed BDW with a pistol owned by Mark Gordon. At the time of BDW's death, Morgan was employed by DSS as BDW's social worker. McGinnis was a Circuit Manager for the DSS and supervised approximately 60 employees, including Morgan.

B. 42 U.S. C. § 1983

Count II sets forth a claim against all Defendants for wrongful death under 42 U.S.C. § 1983 ("§ 1983").

Plaintiff alleges that Defendants, acting under color of state law, recklessly in a grossly negligent manner, and with deliberate indifference to Plaintiff's and BDW's rights, failed to protect BDW from harm and failed to provide protective case worker services. (Doc. #65). Plaintiff further alleges that Defendants failed to follow their own internal policies and practices as well as statutory requirements and regulations designed to protect BDW and failed to provide him with the requisite level of care and protection required by law. Id.

Defendants argue that the Court should grant summary judgment on Plaintiff's § 1983 claim against Morgan and McGinnis because, as government officials, they are entitled to qualified immunity. The Court disagrees. Government officials are not shielded from liability under § 1983 when their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Burton v. Richmond, 276 F.3d 973, 976 (8th Cir. 2002) quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "The right to personal security is a 'historic liberty interest protected substantively by the Due Process Clause. "' Id. quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977). The state has an obligation to provide adequate medical care, protection and supervision to children placed in foster homes. Norfleet v. Arkansas Dept of Human Serv., 989 F.2d 289, 293 (8th Cir. 1993). To succeed on such a claim, Plaintiff must allege acts that shock the conscience. S.S. v. McMullen, 225 F.3d 960, 964 (8th Cir. 2000). Merely negligent acts are insufficient as a matter of law. Id.

The Court finds that genuine issues of material fact exist regarding whether Morgan and McGinnis

committed acts or omissions that rise above mere negligence and reach the level of "shocking the conscience." Plaintiff claims, among other things, that neither Morgan nor McGinnis ever inquired about whether the Gordons' numerous guns were unloaded and secured, despite the fact that the existence of these guns at the Gordon's home was well documented. Defendants claim Morgan and McGinnis had no reason to know about the guns, no reason to ask the Gordons about guns, and no reason to suspect that the Gordons had unsecured guns in their home. The parties' conflicting versions of the facts create a genuine factual dispute that is appropriately determined by a jury. Accordingly, summary judgment is inappropriate on Plaintiff's claims against Morgan and McGinnis under Count II.

Defendant also argues the Court should grant summary judgment on Plaintiff's § 1983 claim against DSS because Plaintiff's claims are barred by the Eleventh Amendment. The Eleventh Amendment protects non-consenting states from suits for damages in federal court. Hadley v. North Arkansas Comm. College, 76 F.3d 1437, 1438 (8th Cir. 1996). However, a state may consent to be sued in federal court. Sante Sioux Tribe of Nebraska v. State of Nebraska, 121 F.3d 427, 432 citing Burk v. Beene, 948 F.2d 489, 493 (8th Cir. 1991). A state voluntarily invokes the federal court's jurisdiction, thereby waiving its Eleventh Immunity, when it voluntarily removes the action to federal court. Skelton v. Henry, 390 F.3d 614, 618 (8th Cir. 2004) citing Lapides v. Bd. of Regents, 535 U.S. 613, 619 (2002). This case was originally filed in state court, and Defendants voluntarily removed it to this court. Accordingly, Defendants have waived their Eleventh Amendment

immunity.

C. State Wrongful Death Claim

Count I sets forth a state law claim against all Defendants for the wrongful death of BDW. Under Count I, Plaintiff claims Defendants acted negligently, recklessly, and with gross negligence by failing to monitor and adequately supervise the Gordons and BDW in the provision of caseworker services while BDW was residing in the Gordons' home.

Defendants argue the Court should grant summary judgment on Plaintiff's claims in Count I against Morgan and McGinnis because Plaintiff has not established a submissible underlying claim; in this case, substantive due process pursuant to § 1983. Plaintiff contends that the allegations in Count I and in Count II are not subject to the same standards of proof, arguing that although simple negligence does not support Plaintiff's § 1983 claim, negligence does support a claim for wrongful death under Mo. Rev. Stat. § 537.080. However, the Court need not decide this issue because, as discussed above, Plaintiff has in fact established a submissible § 1983 claim.

Defendants further argue that Morgan and McGinnis are entitled to summary judgment on Count I pursuant to the official immunity doctrine and the public duty rule. However, the Missouri Supreme Court has indicated that the "doctrine of official immunity shields officials from liability for injuries arising only out of their discretionary acts or omissions." Charron v. Thompson, 939 S.W. 885, 886 (Mo. 1996) citing Kanagawa v. State By and Through Freeman, 685

S.W.2d 831, 835 (Mo. banc 1985). Officials may be held liable for injuries resulting from ministerial acts. Id. Whether a function is discretionary or ministerial is determined on a case by case basis by weighing factors such as the nature of the official's duties and the extent to which the acts involve policymaking or the exercise of professional expertise and judgment. Id. citing Kanagawa, 685 S.W.2d at 836. "A ministerial function is one which a public officer is required to perform `upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to [an employee's] own judgment or opinion concerning the propriety of the act to be performed.'" Id. quoting Rustici v. Weidemeyer, 673 S.W.2d 762, 769 (Mo. banc 1984) quoting Jackson v. Wilson, 581 S.W.2d 39, 43 (Mo. App. 1979).

Plaintiff argues that numerous of Morgan's and McGinnis' actions did not involve any degree of discretion, but instead involved simply following DSS policy with regard to ensuring the safety of foster children. While certain aspects of a social worker's handling of a child's case are certainly discretionary, this case involves numerous factual disputes regarding what DSS policy required of DSS employees with respect to the safety of foster children, and what degree of discretion DSS employees were afforded in implementing the applicable policy. Plaintiff's have set forth sufficient evidence from which a reasonable jury could determine that many aspects of this case involved the ministerial, non-discretionary aspect of implementing clearly defined DSS procedures and policies with regard to the safety of foster children. Accordingly, the Court cannot determine as a matter of law that Morgan's and McGinnis' actions and inactions

involving BDW were purely discretionary functions. Summary judgment is therefore inappropriate on Plaintiff's state law wrongful death claim against Morgan and McGinnis.

Defendants further contend that the public duty doctrine protects Morgan and McGinnis from liability. Under that doctrine, a public employee is not liable to an individual for injuries resulting from a breach of duty the employee owes only to the general public. Davis-Bey v. Missouri Dept of Corrections, 944 S.W.2d 294 (Mo. Ct. App. W.D. 1997). However, as discussed above, Defendants indeed owed a duty to provide BDW with the requisite level of care and protection from harm. This duty was owed to BDW individually, not to the public at large. Accordingly, the Court is unpersuaded by Defendants' argument that the public duty doctrine protects Morgan and McGinnis from liability.

Finally, Defendants argue that Plaintiff's state law wrongful death claim against DSS is barred by the doctrine of sovereign immunity. In Plaintiff's opposition to Defendants' Motion for Summary Judgment, Plaintiff concedes that her claims against DSS do not fall within any statutory exception to sovereign immunity and are therefore barred. Accordingly, summary judgment is appropriate as to Plaintiff's state law wrongful death claim against DSS in Count I.

CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment is DENIED as to Counts I and II against Morgan and McGinnis. Summary judgment is also DENIED as to Plaintiff's § 1983 claim against DSS,

as set forth in Count II. However, Summary Judgment is GRANTED as to Plaintiff s state law wrongful death claim against DSS, as set forth in Count I.

IT IS SO ORDERED.
s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT
DATED: May 4, 2007

Filed 1/7/2009
No. 07-2250
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Brandie McLean,
Plaintiff-Appellee,

Rhonda Stone, Rhonda Stone as Next Friend of Minors ZPW(I), ZPW(II), CZW and KSW, Minors et al.,
Plaintiffs

v.

Mark Gordon et al.,
Defendants,

John McGinnis et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

ORDER

The petition for rehearing by the panel filed by appellee has been considered by the court and is denied.

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/Michael E. Gans

28 USC § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 USC § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to

intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

42 USC § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 537.080 R.S.Mo. (2009). Action for wrongful death--who may sue--limitation

1. Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured, which damages may be sued for:

(1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;

(2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;

(3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem. Such

plaintiff ad litem shall be appointed by the court having jurisdiction over the action for damages provided in this section upon application of some person entitled to share in the proceeds of such action. Such plaintiff ad litem shall be some suitable person competent to prosecute such action and whose appointment is requested on behalf of those persons entitled to share in the proceeds of such action. Such court may, in its discretion, require that such plaintiff ad litem give bond for the faithful performance of his duties.

2. Only one action may be brought under this section against any one defendant for the death of any one person.

Amendment XIV [Privileges and Immunities, Due Process, Equal Protection, Apportionment of Representatives, Civil War Disqualification and Debt (1868)]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

13 CSR 40-60.040 Physical Standards for Foster Homes
PURPOSE: This rule explains what is required in a physical structure. It further describes sleeping arrangements and fire and safety requirements.
(1) General Requirements.
(A) The foster parent(s) shall be so located that they have access to schools, recreational, religious or other community resources.
(B) The home shall be so constructed, arranged and maintained as to provide adequately for the health and safety of all occupants. It shall be of size and space and shall have furnishings and equipment to accommodate comfortably both the foster family and foster children in their care.
(C) The division may require inspection of the home by fire, health, sanitation or safety officials when in the agency's judgment such expert opinion is needed to assist in making a decision about the safety of the home for the care of foster children.
(D) All flammable liquids, matches, cleaning supplies, poisonous materials, medicines, weapons or other hazardous items shall be stored so as to be inaccessible to the children.
(E) Private water supply shall be safe for human consumption and testing shall be required at the time of licensing.
(F) The interior of the home shall be free from an accumulation of visible dirt and any evidence of vermin and rodent infestations.
(G) All rooms shall have proper lighting and ventilation. Windows and doors shall be screened as needed unless the area is air conditioned.
(H) All interior doors shall be designed to permit the opening of a locked door from the outside in an emergency.

(I) The home shall have space for indoor play and access to outdoor play space. The outdoor play space shall be fenced when in the judgment of the division, nearby street traffic, railroad tracks, lake, river or other potential hazards suggest the necessity for such protections.

(J) Mobile homes.

1. There shall be an exit(s) at each end(s) of the home.

2. The mobile home shall be skirted with latticed or solid skirting and securely anchored by cable to the ground.

(2) Sleeping Arrangements.

(A) Foster children shall not be permitted to sleep in any building, apartment or other structure which is separate from the foster family home; nor shall any foster child be permitted to sleep in an unfinished attic, in an unfinished basement or in a hall or any other room which is normally used for other than sleeping arrangements.

(B) Foster children under ten (10) years of age shall not be permitted to sleep in finished basement bedrooms or in bedrooms above the second floor of a single family dwelling unless suitable provision has been made for heating, ventilation and humidity control and all exits from these bedrooms have been approved by the division.

(C) At night a responsible adult shall sleep within call of the foster children.

(D) Foster children of the opposite sex, who are over six (6) years of age, shall not sleep in the same room.

(E) Foster children over two (2) years of age shall not sleep in the bedroom of the foster parents except for special temporary care, such as during a child's illness.

(F) Each bed or crib shall be of a size as to insure comfort of the foster child, shall have suitable springs in

good condition, clean and comfortable mattress with waterproof covering, if needed, and suitable covers adequate to the season.

(G) Each foster child under age two (2) shall have a separate bed. Each foster child over age two (2) shall have bed space equivalent to one-half (112) of a full-size bed.

(H) Separate and accessible drawer space for personal belongings and closet space for clothing shall be available for each foster child.

(3) Fire and Safety Requirements.

(A) In all foster homes the telephone numbers of the fire department, police, doctor and ambulance shall be posted at all times. The house number shall be plainly visible from the street in case of emergency.

(B) The foster family shall have a plan for evacuation in case of fire. Foster children shall be instructed in the evacuation plan. The plan shall be posted. Fire drills shall be held.

(C) Every room used for sleeping, living or dining purposes shall have at least two (2) means of exit. At least one (1) of which shall be a door or stairway providing a means of unobstructed travel to the outside. An operable window will be considered as one (1) means of exit.

(D) No room or space shall be occupied for living or sleeping purposes which is accessible only by a ladder, folding stairs or through a trap door.

(E) In apartment buildings where the foster family residence is second floor or above there shall be an exit stairway.

(F) A smoke detector shall be installed at a location where sleeping areas can be alerted. (G) A portable ABC fire extinguisher of at least two and one-half (2 1/2) pound capacity shall be located near the kitchen

area.

(H) Heating appliances shall not be located in a place which blocks escape in case of malfunctioning which could result in a fire.

(I) Fireplaces, wood stoves, heaters, radiators or floor furnaces shall be protected as required by the fire inspector.

AUTHORITY section 210.221, RSMo 1986. Original rule filed May 10, 1978, effective Sept. 11, 1978. Amended: Filed June 28, 1983, effective Nov. 11, 1983.

*Original authority: 210.221, RSMo 1949, amended 1955.

F.R.C.P. Rule 56. Summary Judgment

(a) By a Claiming Party.

A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 20 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) By a Defending Party.

A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings.

The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) Establishing Facts.

If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) Establishing Liability.

An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) In General.

A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond.

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable.

If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavits Submitted in Bad Faith.

If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the

submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

EXHIBIT J

Firearm Safety

In the United States, accidents involving firearms kill 250 children under the age of 14 every year. The best way to prevent these deaths is eliminate guns from your home. As a resource family you are responsible to ensure that you comply with your state laws and agency regulations or policies related to firearms. If you do own a firearm, follow these rules to ensure the safety of children in your family:

- Store guns unloaded and in an uncocked position in a securely locked case out of children's reach. Store ammunition separately, in a securely locked container out of the reach of children.

- Always use trigger locks or other childproof devices.

- Teach children that guns are not toys

- Teach children to report to you if they find any guns or ammunition

- If you child spends time in other homes, ask the parents if there are guns in the house and how they are stored

Foster STARS/Adopt STARS STARSbook – 2004
Promoting Safety, Permanence, and Well-Being

EXHIBIT L – (Form CS – 45)

Missouri Department of Social Services
Division of Family Services
Kinship Home and Safety Checklist

	Date
Name of Potential Kinship Provider(s)	Tel #
Street	City
State	Zip Code
Relationship	DOB
Others in Home	Age
Name of Youth	

A. Potential Placement Family Personal Inf***

Have you or any Household Member Ever:	Y	N
1. Been Convicted of a Felony?		
2. Been Convicted of a Crime?		
3. Committed an Act of Child Abuse or Neglect, as Confirmed by DFS?		
4. Had Serious Illness that is Still Contagious?		
5. Been Treated or Diagnosed for Chemical Dependency and/or Alcoholism?		
6. Received a DUI/DWI?		

If You Answered Yes to Any of the Above, Please Attach a Detailed Explanation

B. Care and Supervision of Youth

You or Do You:	Y	N
1. Cooperate with and Follow Kinship		

Placement Plan Regarding Contact with Relatives?		
2. Assure Regular School Attendance and/or Cooperate with Educational Plan?		
3. Provide Appropriate Supervision/Nurturing and Care of Children?		
4. Agree to Use Consistent, Appropriate Discipline and Consequences:		
5. Agree not to Use the Following Forms of Punishment		
A. Corporal Punishment (Children in DFS Custody)		
B. Tying or Binding		
C. Confining in Locked or Dark Area		
D. Witholding Food, Rest, Or Toilet Use		
E. Refusing Access to the Home		
F. Mental or Emotional Cruelty		
6. Work Cooperatively with DFS, Juvenile Court Officials, and Others as Necessary to Develop and Fulfill Plans for the Youth *** Home?		

C. The Kinship Placement Home

Physical and Safety Requirements	Y	N
1. Home Appears Clean and in Good Repair?		
2. Porches, Rails and Steps Appear Safe?		
3. Mobile Homes Have Two Exits Located in Different parts of the Home?		
4. If a Basement is Used for Sleeping, it Must have a Second Exit to the Outside, It Should not Pass by a Heating Appliance		
5. Working Smoke Detectors are Installed at a Location Where Sleeping Areas Can be Alerted?		
6. 2* Pound Capacity Fire Extinguishers is		

Located in the Kitchen Area?		
7. Bedroom has Windows to Provide Immediate Access to Outside?		
8. One Half of a Full Sized Bed for Youth Over Age 2 Will be Provided?		
9. Rooms for Children/Youth Over the Age of 8, of Opposite Sex Will be Provided?		
10. Separate Rooms from Adults Will be Provided for Youth Over 24 Months, If Not, Explain?		
11. Provide Separate Accessible Drawer and Closet Space to Each Child?		
12. Alternative Heating Source?		
13. Screen on Windows Above 2nd Floor?		
14. Flammable Liquids, Matches, Cleaning Supplies, Poisonous Materials, Medicine, Weapons and Other Hazardous Items are Stored so as to be Inaccessible to Children?		

D. Health Care Policies

	Y	N
1. Appropriate Medical Care will be Provided for Youth?		
2. Kinship Providers are in Good Health? If No, Explain		
3. Kinship Providers Submit a ***-215 Foster Family Home Medical Report, Which is a Statement of Physical and Mental Health.		

E. Policies Relating to Illness/Emergencies

	Y	N
1. Kinship Family Emergency Procedures:		
A. Have an Emergency Exit Plan Developed and Posted		
B. Will Have an Emergency Plan Reviewed with Kinship Youth		

C. Agree to Report Serious Accidents, and/or Illness, or Deaths to the Appropriate Juvenile Justice Official and DFS		
D. Agree to Report Suspected Child Abuse to Authorities		
E. Telephone Numbers of the Fire Department, Police, Doctor and Ambulance are Posted at All Times, House Number is Plainly Visible from the Street in Case of an Emergency.		

F. Expectations of the Kinship Provider(s) – For Agency Arranged Care Only

I/We Agree	Y	N
1. To Cooperate with Treatment Goals Established for Children, to Participate in Case Planning Activities and Family Support *** Meetings		
2. To Abide by Visitation Arrangements Set Forth by the Family Support Team or the Court		
3. To Provide Reasonable and Customary Transportation for Children to School and Community Activities, Medical, Dental, and Counseling Appointments and Family Visits		
4. To Obtain Routine and Emergency Medical and Dental Care for Children, as Necessary, to Monitor the School Progress and Attendance of Children, as Necessary, and to Provide Children with Reasonable Access to Appropriate Community Activities.		
5. Not to Disclose Confidential Medical, Personal or Social Information Regarding the Child in Their Care.		
G. Is There Anything Else that the Division		

Should Know About You and/or Your Family that Would be Relevant for a Kinship Placement in Your Home? If Yes, Explain		
H. I/We Have Answered the Questions as Accurately as I/We Can and Believe I/We Would Provide Placement for the Above-Named Youth		

Signature of Potential Placement parent	Date

I Agree to voluntarily Place My Child(ren) in This Kinship Home Upon the Recommendation of the Division of Family Services and the Juvenile Court/Law Enforcement. I Understand that the Division Will be Working with My Family during This Period of Time With the Goal to Reunify My Child(ren) With Me in My Home

Signature of Bioligical Parent	Date

I Have toured This Home and Reviewed This Form With the Potential Placement Parent(s) and Am of the Opinion That the Above Information is Accurate and That the Home and Potential Kinship Parent(s) Appear Acceptable for theKinship With the Possible Concern(s) and *** as Noted.

Signature of Social Service Worker	Date